

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PHILOMENA WOHLFORD

Claimant

VS.

BOMBARDIER AEROSPACE/LEARJET

Self-Insured Respondent

)
)
)
)
)
)

Docket No. 1,021,347

ORDER

Respondent appealed the October 6, 2008, Review & Modification Award entered by Administrative Law Judge John D. Clark. The Workers Compensation Board heard oral argument on January 16, 2009, in Wichita, Kansas.

APPEARANCES

John L. Carmichael of Wichita, Kansas, appeared for claimant. Vincent A. Burnett of Wichita, Kansas, appeared for respondent (Bombardier).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Review & Modification Award. In addition, the parties agreed to consolidate this claim with Docket No. 1,027,918 for purposes of taking evidence as the claims are interrelated. Accordingly, the following transcripts are also part of the record in this claim: the May 2, 2006, Preliminary Hearing transcript; the June 13, 2008, deposition transcript of C. Reiff Brown, M.D.; the August 4, 2008, deposition transcript of James L. Gluck, M.D.; the August 4, 2008, deposition transcript of Philomena Wohlford; the August 7, 2008, deposition transcript of Paul Stein, M.D.; and the August 8, 2008, deposition transcript of Chris D. Fevurly, M.D.

ISSUES

This is an appeal in a review and modification proceeding. Judge Clark initially decided this claim in a February 10, 2006, Award, in which claimant was granted a 25.5

percent work disability¹ for a February 5, 2003, accident. Bombardier appealed that Award to the Board. In its June 30, 2006, Order, the Board affirmed the Judge's finding of a 26 percent wage loss but decreased claimant's task loss to 18.5 percent, which reduced claimant's work disability to 22 percent for the injuries she had sustained to her neck and right shoulder. Claimant's 26 percent post-injury wage loss was based upon the wages claimant was earning working for another employer, The Arnold Group (Arnold).

But while the appeal was pending before the Board, claimant left her employment with Arnold, where she had worked from May 23, 2005, through February 19, 2006. Consequently, claimant promptly applied for review and modification of the February 10, 2006, Award, alleging there had been a change of wages and change of condition. That application was filed with the Division of Workers Compensation on February 28, 2006. Two weeks later claimant filed an application for hearing in Docket No. 1,027,918, alleging she had injured her neck, back, both shoulders and both arms while working for Arnold.

In the October 6, 2008, Review & Modification Award, Judge Clark found claimant's wage loss had increased from 26 percent to 56.36 percent², which increased her work disability from 22 percent to 37.21 percent³ commencing February 20, 2006 (the date claimant began working for another employer).

Bombardier contends Judge Clark erred by granting claimant additional work disability benefits. Bombardier argues claimant's award of work disability should not be modified as claimant created her additional wage loss by voluntarily leaving Arnold's employment. In addition, Bombardier argues that claimant sustained later injuries at Arnold that terminates claimant's right to modify the award she received in this claim. Accordingly, Bombardier maintains any increased work disability should be paid by Arnold in Docket No. 1,027,918 as these two claims should be considered together. Finally, Bombardier contends the Judge did not follow K.S.A. 44-511 and, therefore, erred in computing claimant's post-injury wage.

In short, Bombardier requests the Board to (1) deny claimant's request to increase her award of work disability benefits, (2) find that any additional work disability is the result

¹ A permanent partial disability under K.S.A. 44-510e that is greater than the functional impairment rating.

² The Judge determined claimant sustained a 56.3 percent wage loss by comparing claimant's pre-injury wage at Bombardier of \$1,205.47 to a post-injury wage at RJR Financial Services of \$526.04.

³ When averaging claimant's new wage loss with her task loss, it appears the Judge erred by using an 18.05 percent task loss rather than the correct amount of 18.5 percent.

of the injuries she later sustained while working for Arnold, and (3) use a higher post-injury average weekly wage should claimant's award be modified.

Claimant argues she now has a 61 percent wage loss when considering the self-employment taxes she now pays. She also argues her job with Arnold ended due to an economic layoff and that she exercised good faith in obtaining other employment. Finally, she argues the injuries she sustained working for Arnold did not prevent her from doing that work except for a short period immediately following her right carpal tunnel and right shoulder surgeries. Accordingly, claimant requests the Board to increase her work disability and to grant her ongoing medical treatment in either this claim or the related claim.

The issues before the Board on this appeal are:

1. Should claimant's 22 percent work disability be increased because she has left Arnold's employment and is now earning less?
2. If so, what is her post-injury average weekly wage for purposes of K.S.A. 44-510e?
3. Should any increased work disability be assessed against Bombardier or, instead, against Arnold in Docket No. 1,027,918?
4. Should Bombardier at this time be required to designate an authorized physician for claimant to consult for future medical treatment?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

On February 5, 2003, claimant fell at work and dislocated her right shoulder, tore her right rotator cuff, and broke her right upper arm. At the time of the accident claimant was employed by Bombardier. In an Award dated February 10, 2006, Judge Clark determined claimant's date of accident was February 5, 2003, and that claimant had sustained a 20 percent whole person impairment for permanent injuries she sustained to her neck and right upper extremity. The Judge also determined claimant sustained a 25.5 percent work disability under K.S.A. 44-510e, commencing January 27, 2005, which was the approximate date claimant was laid off by Bombardier.

Claimant's 25.5 percent work disability represented a 25 percent task loss and a 26 percent wage loss. That wage loss was based upon the wages that claimant was earning working for Arnold, where claimant had commenced working on May 23, 2005. And

Arnold, which is a temporary employment agency, assigned claimant to work at Bombardier.

Bombardier appealed the February 10, 2006, Award to this Board, which affirmed the Judge's finding that claimant had sustained a 20 percent whole person impairment as measured by the AMA *Guides*.⁴ The Board, however, reduced claimant's task loss to 18.5 percent. Accordingly, in its June 30, 2006, Order, the Board reduced claimant's work disability to 22 percent effective April 29, 2005, or the day after Dr. Paul S. Stein released claimant as having reached maximum medical improvement.

The Board also noted in its June 2006 Order that claimant's work for Arnold was aggravating her symptoms. The Board wrote in part:

Claimant now works at [Bombardier] as a temporary worker through The Arnold Group. She works 40 hours per week plus 10 to 15 hours overtime and works on a computer most of the time. No one from The Arnold Group supervises her work. She reports to a supervisor at [Bombardier].

Claimant filled out the application for employment at The Arnold Group on May 13, 2005. She did not fill out any form from The Arnold Group that asked anything about her physical condition. No one from The Arnold Group asked her anything about her workers compensation claim. She testified that she did not tell The Arnold Group about her restrictions because she had been asked by Joni Holding, the human resources representative at [Bombardier], to submit an application because [Bombardier] wanted to hire her for employment through The Arnold Group. She knew that [Bombardier] was aware of her restrictions.

Claimant's first day of work as a temporary employee at [Bombardier] through The Arnold Group was May 23, 2005. She has had a flare-up of her condition because of the constant typing she is now doing. Claimant said she currently wakes up feeling well, but as the day progresses, the numbness comes into her fingers and her shoulder and neck hurts. She has continuous pain in her shoulder and neck caused by constant computer work. Because her shoulder was not getting better, the fingers continued to tingle, and her neck kept hurting, she returned to Health Services in June 2005. . . .

Claimant testified that there has been no occasion since her employment with The Arnold Group that she has been asked to do something she felt was outside her restrictions or that she told anyone she could not do. Her current job

⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

at [Bombardier] is within her restrictions, although she feels she is overdoing it and needs to get up and take breaks.⁵

Claimant leaves The Arnold Group and seeks additional medical treatment

While the February 10, 2006, Award was pending review before this Board, claimant left her job with Arnold with February 19, 2006, being her last day of work. The next day claimant began working for RJR Financial Services (RJR) for less wages preparing income tax returns and performing other tasks.

Claimant promptly filed a request in this claim to review and modify the February 10, 2006, Award against Bombardier due to her decreased earnings and alleged changed conditions. The Division of Workers Compensation received that application on February 28, 2006. Two weeks later claimant filed an application for hearing in Docket No. 1,027,918, alleging she had injured both shoulders, arms, her neck and back working for Arnold.

On May 2, 2006, Judge Clark conducted a hearing in which claimant requested medical treatment from either Bombardier or Arnold. At that hearing claimant testified that when she began working for Arnold her work was similar (other than the long hours she worked for Arnold) to the work she was doing for Bombardier when she was laid off in early 2005. She also testified that in either late October or early November 2005 her job duties changed from doing computer work in an office setting to working on the warehouse floor where she pulled parts, which she carried back to her computer for matching part numbers and serial numbers with computer data. The warehouse job sometimes required overhead reaching and carrying heavy parts, such tasks she avoided by obtaining assistance from co-workers. At the May 2006 hearing, claimant testified she believed the warehouse job exceeded the work restrictions that Dr. Stein had previously recommended for her neck injury.⁶

Nonetheless, as indicated above, even before the warehouse job claimant experienced increased symptoms in her neck, right shoulder, and arms as she had sought additional medical treatment in either June or July 2005 at the Bombardier medical facility, which prescribed physical therapy. Claimant primarily attributed those increased symptoms to the long hours she was working for Arnold. Indeed, claimant worked 62

⁵ *Wohlford v. Bombardier Aerospace/Learjet*, No. 1,021,347, 2006 WL 1933441 (Kan. WCAB June 30, 2006).

⁶ In its June 30, 2006, Order, the Board found Dr. Stein recommended permanent restrictions of avoiding repetitive overhead work and activity that required repetitive bending or twisting of the neck. And those restrictions were provided for claimant's cervical spine problems.

hours her last week with Arnold. Moreover, claimant testified at the May 2006 hearing she quit Arnold's employment because she "just couldn't hardly take it anymore."⁷ In short, she was experiencing more pain, taking more pain pills, having more headaches, experiencing more severe headaches, hurting in her neck and shoulder, and having more numbness and tingling in her fingers and arms.

What is more, a major factor in claimant's decision to leave Arnold's employment was the opportunity to work for RJR where she would prepare tax returns and perform other clerical work, which she felt would be better suited to her physical abilities and within her permanent work restrictions. In February 2006 claimant knew tax returns were piling up at RJR and she was concerned she might lose that job. At that time claimant also knew her job with Arnold was only temporary and she had been told her job would probably end in February 2006. She was first told her job would end in late 2005, next she was told it would end in mid-January, and she was then told the job would end in late February.

Claimant's wages working for RJR Financial Services

In the February 10, 2006, Award the Judge determined claimant's post-injury average weekly wage at Arnold was \$879.72. Claimant's job with RJR paid her less than that.

When claimant began working for RJR she earned \$400 per week in salary. Since that time she has been given numerous raises and has been paid numerous bonuses. RJR generally pays claimant her weekly salary regardless of the number of hours she works. And RJR oftentimes pays her a bonus before she leaves on trips. Nonetheless, RJR does not provide claimant with health insurance. Moreover, RJR treats claimant as an independent contractor and, therefore, she is responsible for the self-employment taxes on her income.

Form 1099s and an accounting spreadsheet from RJR were entered into evidence. Those documents indicate claimant received \$22,595 in salary and bonuses in 2006 for the 45 weeks that she worked for RJR during that calendar year. Those same documents also indicate claimant received \$27,175 during 2007 and \$16,285 for 28 weeks that she had worked for RJR in 2008.

Accordingly, the Board finds claimant's post-injury average weekly wage from February 20, 2006, through December 31, 2006, was \$502.11. What is more, the Board

⁷ P.H. Trans. (May 2, 2006) at 16.

finds claimant's post-injury average weekly wage for purposes of K.S.A. 44-510e⁸ commencing January 1, 2007, was \$522.60 and commencing January 1, 2008, was \$581.61.

Medical opinions

Dr. James L. Gluck

Dr. Gluck, who is the orthopedic surgeon who first operated on claimant's right shoulder in February 2004, initially released claimant with restrictions in June 2004. But she returned to him in October 2004 with additional right shoulder pain. The doctor advised claimant he did not believe her shoulder would return to normal due to the massive rotator cuff tear she had sustained, along with a retracted tendon. The doctor told claimant she would never have normal strength in her right shoulder and she would have intermittent shoulder discomfort. In December 2004 claimant reported to the doctor she had numbness in her right hand, which had started approximately 2 months before. Dr. Gluck injected claimant's right shoulder and ordered a nerve test for both upper extremities, which tested normal.

In July 2005, the doctor rated claimant as having a 17 percent impairment to her right upper extremity due to the rotator cuff tear and a 5 percent impairment to the right upper extremity due to numbness (related to carpal tunnel syndrome⁹). Combining those ratings, Dr. Gluck concluded claimant had a 22 percent impairment to the right upper extremity. The doctor did not attempt to rate what impairment, if any, claimant had in any other part of her body.

In June 2006 Dr. Gluck again began treating claimant for increased right shoulder pain, which claimant attributed to a lot of lifting in the warehouse at Bombardier. Claimant also told the doctor that she had quit her job in February 2006 due to the worsening pain. Claimant also had symptoms in her right wrist. The doctor repeated the nerve tests, which this time indicated claimant had moderate carpal tunnel syndrome on the right and mild carpal tunnel syndrome on the left. Consequently, on August 1, 2006, the doctor performed a right carpal tunnel release.

In September 2006 Dr. Gluck wrote Arnold's attorney that he believed claimant's increased right shoulder complaints and the need for medical treatment were related to the work claimant had performed in the warehouse at Bombardier. Nonetheless, at his

⁸ See *Nistler v. Footlocker Retail, Inc.*, 40 Kan. App. 2d 831, 196 P.3d 395 (2008).

⁹ Gluck Depo. (Aug. 4, 2008) at 31.

August 2008 deposition, the doctor added that the clerical work claimant was performing at RJR also contributed to claimant's need for the medical treatment she received from him in 2006. The doctor testified in part:

Q. (Mr. Burnett) So you certainly agree that the necessity of additional medical treatment that you were required to provide in 2006 is related to that increased symptomatology and clinical findings related to the history that she provided to you of working in a warehouse immediately before presentation to you?

A. (Dr. Gluck) That, and the additional clerical work that she was doing at RJR Investments, exactly.¹⁰

The doctor acknowledged, however, that claimant did not attribute any aggravation or worsening of her condition to the work she performed for RJR.

On October 3, 2006, Dr. Gluck performed a right shoulder arthroscopy on claimant. During that surgery the doctor debrided the scar tissue or adhesions that were in the shoulder. Moreover, he found the repair he had done earlier was intact. According to Dr. Gluck the scar tissue was not unexpected as it often develops following a large rotator cuff tear repair. The doctor found no evidence of trauma other than what he first repaired in 2004.

In August 2007 Dr. Gluck rated claimant's right upper extremity for a second time. The doctor did not modify the rating he gave claimant in July 2005, which was based upon his then last visit with claimant in December 2004. The doctor acknowledged, however, that claimant's right upper extremity impairment immediately before surgery was 10 percent due to her carpal tunnel syndrome. Dr. Gluck did not rate the left upper extremity as he did not believe claimant's symptoms warranted a rating or any further treatment.

Although claimant's impairment rating did not change, Dr. Gluck modified claimant's restrictions. In December 2004 the doctor restricted claimant's lifting to the range of zero to 20 pounds and also restricted her to limited overhead work with the right hand. But when the doctor released claimant in March 2007, he restricted her lifting to the range of zero to 10 pounds with the right arm and restricted her to limited overhead work and reaching with the right arm (which was in the doctor's progress notes but not in the December 23, 2004, work progress slip).¹¹ The doctor explained his reasoning for changing claimant's weight lifting restriction:

¹⁰ *Id.* at 38.

¹¹ *Id.* at 50.

Because at the time I thought that was the appropriate restriction, and I think that looking at it it became obvious, don't you think, that I treated her and she went back and she was doing lifting activities and she got worse. So hopefully I will prevent her from running in to problems again.¹²

Finally, Dr. Gluck indicated he used the *AMA Guides* in providing his ratings. Moreover, the doctor did not recommend any additional medical treatment for claimant's right shoulder or wrist.

Dr. Chris D. Fevurly

Dr. Fevurly, who first examined claimant at Bombardier's request in August 2005, examined claimant again in early August 2008. In 2005 the doctor rated claimant as having a 12 percent impairment to her right upper extremity for her right shoulder injury and a 5 percent whole person impairment for her cervical spine injury. But based upon the 2008 examination and using the *AMA Guides*, the doctor determined claimant now had a 10 percent right upper extremity impairment due to her shoulder injury as her range of motion had improved. There was no change in the impairment for claimant's neck. Dr. Fevurly determined claimant now had a 5 percent impairment in each upper extremity from her bilateral carpal tunnel syndrome.

The doctor did not modify the restrictions that he recommended in 2005, which were no prolonged or repetitive overhead reaching or forceful overhead use of the right arm, no prolonged overhead looking, no lifting greater than 60 pounds, no lifting 50 pounds on more than an occasional basis, and no lifting greater than 30 pounds to chest level on more than a frequent basis.

Claimant told Dr. Fevurly about the work she performed for Arnold. She told the doctor that her job required lifting of 20 to 40 pounds but she never did that lifting as she had a male co-worker do it for her. Dr. Fevurly concluded the prolonged keyboard and data entry work that claimant performed for Arnold from May 2005 to February 2006 caused her bilateral carpal tunnel syndrome. The doctor noted at the time of his examination in August 2005 that claimant was then working 50 to 56 hours per week performing computer work the entire day for Arnold and that such work had aggravated claimant's neck and right shoulder symptoms.

¹² *Id.* at 51.

Dr. Fevurly also believed claimant performed repetitive computer activity at RJR that aggravated her carpal tunnel syndrome.¹³ But he further explained that such aggravation did not form a basis to assign any additional impairment.¹⁴

Finally, Dr. Fevurly testified he believed the October 2006 right shoulder surgery was a natural and probable consequence of the trauma that claimant sustained in 2003 when she was working for Bombardier.¹⁵

Dr. Paul S. Stein

Dr. Stein, who treated claimant from January through April 2005 and subsequently evaluated her at Arnold's request in May 2006, examined and evaluated claimant again in July 2008. But this time the evaluation was requested by Bombardier. The doctor determined that the impairment to claimant's neck had not changed and that claimant's right shoulder did not merit any greater impairment than what Dr. C. Reiff Brown found in 2005. Although Dr. Stein did not address claimant's right shoulder in 2005, he did recommend restrictions following the 2008 examination and suggested that claimant avoid activity with her right hand above shoulder level or more than 24 inches away from her body, avoid reaching behind her body, and limit right arm lifting to no more than 10 pounds up to chest level.

For the bilateral carpal tunnel syndrome, which Dr. Stein attributed predominantly to the work claimant performed for Arnold, the doctor determined claimant had a 10 percent impairment in each upper extremity. Regarding restrictions, the doctor recommended that claimant avoid intensive repetitive activity with either hand and avoid using vibrating or impacting power tools due to those injuries.

Regarding claimant's October 2006 right shoulder surgery, Dr. Stein testified that he believed the work claimant performed for Arnold aggravated, accelerated or contributed to the development of the adhesions in her right shoulder.¹⁶ In short, the doctor related the work claimant performed for Arnold to her need for the October 2006 right shoulder surgery.

¹³ Fevurly Depo. (Aug. 8, 2008) at 24, 25.

¹⁴ *Id.* at 38.

¹⁵ *Id.* at 22.

¹⁶ Stein Depo. (Aug. 7, 2008) at 17.

Dr. C. Reiff Brown

Dr. Brown, who is a board-certified orthopedic surgeon, first examined claimant in May 2005, shortly before she began working for Arnold. The doctor examined claimant a second time in mid-March 2008. Both examinations were performed at claimant's attorney's request. And both times the doctor rated claimant's impairment using the *AMA Guides*.

Following both examinations Dr. Brown determined claimant had a 5 percent whole person impairment due to her neck and cervical spine. But in 2008 the doctor also diagnosed myofascial pain syndrome in claimant's upper back, which comprised an additional 5 percent whole person impairment.

Also following both examinations the doctor found claimant had a 7 percent impairment to her right upper extremity for lost range of motion in the shoulder. But the doctor found less crepitus in the right shoulder in 2008 (likely due to the surgery performed by Dr. Gluck in 2006) and the doctor, therefore, reduced the rating for that condition from 12 percent to 6 percent to the right upper extremity. In 2005 Dr. Brown found claimant had a 10 percent right upper extremity impairment due to weakness of abductor function. But the doctor did not provide a rating for that condition in 2008, which he attributes to possible oversight. In 2008, however, the doctor found claimant had a 10 percent right upper extremity impairment due to carpal tunnel syndrome. The doctor did not comment upon the left upper extremity.

Dr. Brown found claimant's right upper extremity impairment was 27 percent in 2005 and that impairment was 22 percent in 2008. The doctor also found claimant had a 20 percent whole person impairment due to her neck and right shoulder in 2005 but in 2008 she had a 21 percent whole person impairment from her neck, right shoulder, upper back and right arm.¹⁷

Dr. Brown attributed claimant's carpal tunnel syndrome to her work at Arnold.¹⁸ But the doctor believed the myofascial pain syndrome in her upper back was a natural consequence of her February 2003 injury at Bombardier.

It appears the doctor attributed the October 2006 right shoulder surgery performed by Dr. Gluck to claimant's February 2003 accident.¹⁹ But on cross-examination the doctor

¹⁷ Brown Depo. (June 13, 2008) at 25.

¹⁸ *Id.* at 26.

¹⁹ *Id.* at 30.

admitted he could not state either way within a reasonable medical certainty whether claimant would have needed the October 2006 surgery had she not worked for Arnold.²⁰ The doctor also testified it was common for someone to undergo surgery at a later date to address the adhesions that naturally form in a shoulder following a torn rotator cuff. But the doctor also testified that repetitive work or trauma would likely speed the development of the adhesions depending upon the severity of the trauma.

The doctor did not modify the restrictions he had recommended in 2005 for claimant's neck injury. Accordingly, Dr. Brown continues to believe that claimant should avoid work that involves frequent extension and rotation of her cervical spine. In addition, the doctor did not modify his opinion that due to her shoulder injury claimant should avoid frequently using her right hand above chest level and avoid frequently reaching away from her body more than 18 inches. But the doctor did somewhat modify claimant's lifting restrictions. In 2005 Dr. Brown recommended that claimant limit her lifting *with both arms* to no more than 20 pounds occasionally and 10 pounds frequently. In 2008, however, the doctor indicated claimant should limit the lifting *with her right arm* to 15 pounds occasionally and 10 pounds frequently. According to the doctor, the 2005 lifting restrictions were primarily for claimant's shoulder and to some extent also for her neck. And, likewise, the 2008 lifting restrictions were primarily for claimant's shoulder and to some extent also for her neck and myofascial pain syndrome.²¹ The record is not clear if the doctor found claimant should be further restricted for the aggravation that she sustained working for Arnold.

Regarding the right carpal tunnel syndrome, Dr. Brown recommended that claimant avoid work that required frequently extending or flexing the right wrist greater than 30 degrees, frequently grasping (such as is required with pliers, scissors and similar hand tools), and vibratory tools. Dr. Brown did not believe claimant had lost any additional work tasks due to her more recent neck and shoulder problems or the resulting myofascial pain condition over and above the task loss he had determined in 2005.

Finally, the doctor testified that claimant's conditions were inclined to fluctuate due to weather changes and her activities. Therefore, the doctor believes claimant will need some conservative treatment such as anti-inflammatory medications, injections, or short courses of physical therapy for flare-ups that may occur. Moreover, the doctor believes that claimant should have an authorized physician on hand and that she not be required to wait three to six months to see a doctor.²² Moreover, the doctor believes claimant

²⁰ *Id.* at 60.

²¹ *Id.* at 36.

²² *Id.* at 39.

should have an authorized doctor to prescribe and renew the prescriptions she now takes for the vertigo she has experienced since the February 2003 accident.

CONCLUSIONS OF LAW

Nature and extent of claimant's permanent disability

As indicated above, when this claim was initially decided the Judge and Board held claimant injured her neck and right shoulder in the February 2003 accident that claimant sustained while working for Bombardier. Both the Judge and the Board initially held claimant sustained a 20 percent whole person functional impairment for those injuries. Accordingly, under K.S.A. 44-510e claimant was awarded a 20 percent permanent partial disability followed by a 22 percent work disability for an 18.5 percent task loss and a 26 percent wage loss. That wage loss percentage was based upon the wages claimant was earning while working for Arnold, where she commenced working on May 23, 2005, and based upon a pre-injury weekly wage of \$1,205.47 and a post-injury weekly wage of \$879.72. The post-injury wage was calculated using wage information provided by Arnold for the pay period ending November 20, 2005.

The Workers Compensation Act provides that awards may be reviewed upon good cause shown. And when the work disability has increased or diminished, the award may be modified.²³

Since November 20, 2005, claimant's employment situation has substantially changed, which in turn has affected her post-injury wages and potentially her work disability. As indicated above, claimant's work for Arnold aggravated her neck and right shoulder conditions. In addition, that work caused her to develop bilateral carpal tunnel syndrome in her upper extremities. Working for Arnold claimant spent most of her day on a computer and worked many overtime hours, often working 11- and 12-hour days. During her last week with Arnold claimant worked 62 hours. And when she transferred to the warehouse her symptoms increased. Claimant testified, in part:

While I was with The Arnold Group, the pain got worse as I continued to work on the floor. At Bombardier, I would say that the pain was a little different, because of the extreme injury that I had, I had a completely torn rotator cuff, and so the pain was there and it started to help -- get better, but when I started to work at The Arnold Group, it started to increase in pain as I worked along.

. . . .

²³ See K.S.A. 44-528(a).

I would say the constant keyboarding and the parts that I had to go get while on the shelves, although I was very careful at what I did, and if there were parts that were up high, I did ask for help to get those down.²⁴

Claimant left Arnold's employment on February 19, 2006, and began working for RJR the next day. Eventually claimant underwent both right carpal tunnel release and right shoulder surgeries due to the injury and aggravation she had sustained working for Arnold.

In sharp contrast to the job claimant had with Arnold, the work she performs for RJR has not aggravated her injuries. RJR accommodates claimant's injuries by providing someone to do any lifting that is required, allowing her to work at her own pace, and permitting her to take breaks and rotate tasks as needed.²⁵ Moreover, RJR lets claimant take time off work when needed due to her neck and shoulder pain. Claimant has not required any medical treatment for her right shoulder or arm since the doctor released her following her 2006 surgeries.

The Board finds the aggravation claimant sustained to her neck and right shoulder from the work she performed for Arnold did not cause any additional permanent injury or impairment to her neck or right shoulder. None of the physicians who testified indicated claimant sustained any additional permanent impairment due to the aggravation to her neck and right shoulder. Likewise, the greater weight of the evidence indicates the restrictions for her neck and right shoulder did not really change. The impairment rating for claimant's right shoulder did not increase; rather, claimant's right shoulder is now better than what it was when claimant left Bombardier's employment in early 2005.

The Board is aware that in March 2007 Dr. Gluck restricted claimant's lifting to a range of zero to 10 pounds, which was less than his initial lifting restriction of zero to 20 pounds that the doctor gave claimant following her first right shoulder surgery. But the doctor reduced claimant's weight lifting maximum not because she had sustained additional permanent injury to her shoulder but, instead, because the doctor had merely reconsidered the restrictions he should have initially given claimant in 2004 or 2005.

Moreover, the Board finds the job that claimant performed for Arnold was not appropriate for her. As indicated above, shortly after claimant commenced working for Arnold in late May 2005 she began having increased neck and shoulder symptoms and in June 2005 she sought additional medical treatment at Bombardier's medical department. Had claimant terminated her employment with Arnold at that point she may have avoided developing bilateral carpal tunnel syndrome and avoided further aggravating her right

²⁴ R.H. and R.M.H. Trans. at 23, 24.

²⁵ *Id.* at 29, 30.

shoulder and the resulting October 2006 right shoulder surgery. And had she terminated her employment at that time it could hardly be said that she was not exercising good faith.

In short, the injury at Bombardier set claimant's disability. And, as indicated by *Surls*,²⁶ when an initial injury sets the level of disability an injured worker may continue to be entitled to receive a work disability for that injury despite sustaining a later injury with another employer that resulted in the loss of employment. That was specifically addressed in *Surls*, which held:

While Neosho would certainly be responsible had there been only its accident, we believe the crucial facts here are that the first (Saginaw) injury essentially set the level of disability and Saginaw declined to reemploy Surls when his Neosho job was no longer available.

. . . .

While the intervening accident did increase Surls['] functional [impairment], which was assessed against Neosho, it did not increase his work disability. Under these somewhat unusual facts, Saginaw cannot complain that it has been unfairly treated just because Neosho refused to continue to provide accommodated employment.

Saginaw is essentially in the same position as if Neosho had not intervened. **Had there been some significant increase in work restrictions caused by the second accident, we might have a different result.**²⁷

Claimant's job at Arnold was not appropriate for her in light of her previous neck and right shoulder injuries. Moreover, claimant exercised good faith in leaving Arnold's employment in February 2006. Consequently, claimant is entitled to receive a modification of her work disability based upon her salary from RJR.

Averaging claimant's wage loss with her 18.5 percent task loss, claimant is entitled to receive permanent disability benefits under K.S.A. 44-510e, as follows:

For the period commencing February 20, 2006, claimant has a 38 percent permanent partial disability for a 58 percent wage loss²⁸ and 18.5 percent task loss.

²⁶ *Surls v. Saginaw Quarries, Inc.*, 27 Kan. App. 2d 90, 998 P.2d 514 (2000).

²⁷ *Id.* at 96 (emphasis added).

²⁸ Comparing claimant's \$1,205.47 pre-injury wage to her \$502.11 post-injury wage.

For the period commencing January 1, 2007, claimant has a 38 percent permanent partial disability for a 57 percent wage loss²⁹ and 18.5 percent task loss.

And finally, for the period commencing January 1, 2008, claimant has a 35 percent permanent partial disability for a 52 percent wage loss³⁰ and 18.5 percent task loss.

Future medical treatment

The Workers Compensation Act provides that an employer is required to provide to an injured worker such medical treatment that is reasonably necessary to cure and relieve the worker from the effects of the injury.³¹ The Act also provides a procedure for workers to obtain post-award medical benefits.³²

At this time the parties can only speculate as to claimant's future need for medical treatment for her neck and right shoulder. And it is not possible at this time to foresee whether such potential future medical treatment would be related to the accident claimant sustained while working for Bombardier, the October 2006 right shoulder surgery that was precipitated by the work she performed for Arnold, her present work, or some other cause. Accordingly, should the need arise claimant may request additional medical care and treatment under K.S.A. 44-510k.

In conclusion, Bombardier is responsible for claimant's increased work disability due to her decreased post-injury wages at RJR. And claimant's request for an authorized treating physician is denied as claimant may make proper application under the Act for additional medical treatment should the need arise.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.³³ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

²⁹ Comparing claimant's \$1,205.47 pre-injury wage to her \$522.60 post-injury wage.

³⁰ Comparing claimant's \$1,205.47 pre-injury wage to her \$581.61 post-injury wage.

³¹ See K.S.A. 2002 Supp. 44-510h(a).

³² See K.S.A. 2002 Supp. 44-510k.

³³ K.S.A. 2008 Supp. 44-555c(k).

AWARD

WHEREFORE, in modifying the October 6, 2008, Review & Modification Award entered by Judge Clark the Board modifies its June 30, 2006, Order as follows:

Commencing February 20, 2006, Philomena Wohlford is entitled to receive permanent partial disability compensation for a 38 percent work disability. And commencing January 1, 2008, Ms. Wohlford is entitled to receive permanent partial disability compensation for a 35 percent work disability. When Ms. Wohlford's award is recalculated, she is entitled to receive the following disability compensation:

Ms. Wohlford is entitled to receive 21.28 weeks of temporary total disability compensation at the rate of \$432 per week, or \$9,192.96, plus 81.74 weeks of permanent partial disability compensation at the rate of \$432 per week, or \$35,311.68, for a 20 percent functional impairment, followed by 8.18 weeks of permanent partial disability compensation at the rate of \$432 per week, or \$3,533.76, for a 22 percent work disability.

Commencing February 20, 2006, Ms. Wohlford is entitled to receive 65.39 weeks of permanent partial disability compensation at the rate of \$432 per week, or \$28,248.48, for a 38 percent work disability.

Commencing January 1, 2008, Ms. Wohlford's work disability decreases to 35 percent, leaving no additional permanent disability compensation due and owing due to the accelerated payout provisions of the Workers Compensation Act.³⁴

Accordingly, Ms. Wohlford is entitled to a total award of \$76,286.88, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Review & Modification Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

³⁴ See *Bohanan v. U.S.D.* No. 260, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

Dated this ____ day of March, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent
John D. Clark, Administrative Law Judge